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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENDELL EATMON, Defendant and Appellant.	A150688 (Alameda County Super. Ct. No. C173422)

A jury found Kendell Eatmon guilty of first-degree murder, being a felon in possession of a firearm, and shooting at an occupied motor vehicle. Eatmon argues the trial court failed to inform him of a jury request to rehear testimony, and improperly admitted gang expert evidence and a gang video that contained inadmissible hearsay. He further claims the cumulative effect of these errors was prejudicial. Finally, he requests that his case be remanded so he may benefit from a statutory change granting trial courts discretion to strike a previously mandatory firearm enhancement. We remand the matter for further consideration of the firearm enhancement and otherwise affirm.

I. Background

A. The Shooting

The victim lived with his mother, his sister, Tiana, and his cousin, Kevin, in Oakland, California.[1] The victim and Kevin were members of the Ney Team, an East Oakland gang. Eatmon was a member of the 76 Bandits, or Bandits, another nearby gang

[1] We will refer to the victim's sister, his friend and a friend of Eatmon by their first names. We do so in order to help protect their identities and mean no disrespect.

in East Oakland. The Ney Team and the Bandits began fighting after a Bandit gang member murdered a Ney Team gang member on September 3, 2011.

A little while before the September 2011 murder, the victim and Tiana went to a store on 76th Avenue and MacArthur Boulevard, where they ran into Eatmon and other members of the Bandits gang. Eatmon asked Tiana if she was "mobbing" for one of her brothers who was in jail at the time, but she did not understand the question. The victim later told her not to return to that store, so she never went back.

The morning of the murder, Tiana and Kevin saw Antonio, a Bandit gang member, in a local store frequented by the Ney Team. Tiana bought three cigarettes and left. Neither of them spoke to Antonio. Together they walked home, where they saw the victim in the driveway. The victim told them that he was going to move his car so it would not be towed. The victim and Kevin left together in the victim's car. Tiana went inside their home.

A short while later, Tiana left to escort a young neighbor down the driveway to ensure he walked home. As she returned up her driveway, she heard a loud noise. She spun around and saw the victim driving his car and Eatmon driving a van. She made eye contact with Eatmon as he drove by. Moments later, Tiana heard gunshots and dropped to the ground.

The victim was driving his car up the street with Kevin in the passenger seat when Eatmon's gold van turned towards them and cut them off. Kevin looked up and saw Eatmon's face just before Eatmon began shooting. When the shooting stopped, Kevin realized the victim was shot, so he ran home to get help.

Tiana ran up the driveway to her mother, who told her to get the victim. As she raced towards the victim's car, Kevin was running up the driveway. He also told her to get the victim. She found the victim inside his car, shaking and bleeding. Police responded to the scene, and the victim was transported to the hospital where he was pronounced dead.

When Tiana spoke with Oakland police later that day, she identified Eatmon as her brother's killer. She even showed Oakland police a photograph of Eatmon by accessing Facebook on her phone.

Oakland police spoke with Kevin a little over a month later. During that interview, they showed Kevin six photographs, and Kevin identified Eatmon as the shooter. Kevin further noted that the shooter was driving a gold van.

At Eatmon's trial, both Tiana and Kevin identified Eatmon as the shooter. Tiana and Kevin also testified about the first murder of a Ney Team gang member. Kevin described the rivalry between the Ney Team and the Bandits.

B. The Gold Van with Black Hood

Within hours of the shooting, Oakland police combed the neighborhood to see if there were any surveillance cameras in the area that captured the shooting. Officers obtained surveillance footage from two nearby homes showing a gold van with a black hood driving on a street near the shooting.

Two days after the shooting, Oakland police officers on their way to the police station from the murder scene spotted the same gold van with a black hood. A friend of Eatmon's, Ventrice, was in the van with her children. She was upset at being stopped by police but was cooperative and agreed to speak with the officers.

The police recorded their interview with her. Ventrice said the gold van with the black hood that she was driving belonged to her friend, Eatmon. She explained that Eatmon had called her the day of the shooting to ask if she wanted to use the van. She went to the Coliseum BART station to pick it up. Eatmon had left the keys inside. Eatmon told her that once she took care of her business with the van to go straight home. When she learned that Eatmon had been arrested for murder, she told police that red flags had "gone off immediately" as she began to wonder whether Eatmon had killed someone in the van or done a hit-and-run. She identified a photograph of Eatmon as the person who had let her use the van but refused to sign it because she was afraid.

The prosecution called Ventrice to testify at Eatmon's preliminary hearing. She changed her story about the van, by claiming that a man named James let her use it.

When asked about James, Ventrice testified that she did not know James' last name, members of his family, or any of his associates. She also claimed that she had not talked to James since police stopped her in August to ask her about the van.

When confronted with her prior statement to police, Ventrice acknowledged that she had spoken with the officers but claimed that she had never associated Eatmon with the van. The prosecutor then impeached her with a video of her interview.

Despite her new story, the prosecutor intended to call Ventrice as a witness at Eatmon's trial. A DA's inspector left a trial subpoena at her home. She acknowledged receiving it when called by the DA inspector and told him that she would be there for trial. But she failed to appear in court on the date specified in the subpoena, so the court issued a warrant for her arrest. The DA inspector called the phone number that Ventrice had previously used and left a message that she needed to appear in court to resolve her warrant. The DA inspector also went to her last known residence only to learn that she had recently moved out.

Based on Ventrice's unavailability, the court permitted the prosecutor to read into evidence her testimony from Eatmon's preliminary hearing. The prosecutor also played the corresponding video clips of her interview in context to show she had been confronted with the prior statements at the preliminary hearing.

C. Cellular Phone Evidence

A DA inspector analyzed Eatmon's cellular phone records to approximate his location. Those records showed that Eatmon's phone was in Hayward the morning of the murder, in East Oakland around the time of the murder and near the Oakland Coliseum—where Holmes picked up the van—just after the murder.

II. Discussion

A. Jury Requested Read-Back

Eatmon contends that the trial court violated his statutory right to be notified of jury requests for testimony.

1. Record

During deliberations, the jury requested a partial read-back of Tiana's testimony. When the transcript was prepared, the reporter went to the jury room to read Tiana's testimony only to have the jury tell her it was no longer needed.

Later that morning, the jury sent a note to the court requesting a read back of Kevin' entire testimony. The court informed counsel of the jury's request. Neither party objected. When the court asked the reporter how long it would take to prepare the testimony, the reporter replied two-and-a-half hours. The court asked the bailiff to inquire of the jury whether it wanted Kevin' entire testimony read back or whether it would like to narrow its request. The bailiff returned with an additional jury note requesting only about 5 minutes of the testimony.

The reporter prepared the requested testimony and read it to the jury without counsel present, after which two jurors requested a few pages of additional testimony. Specifically, the jurors requested that the court reporter read Kevin's testimony that he told his aunt Eatmon was the shooter, his courtroom identification of Eatmon and his identification of Eatmon as the shooter. The reporter informed the judge and the clerk of this request, prepared the transcript, and read the requested testimony to the jury. Neither counsel was informed of these modified requests for only part of Kevin's testimony.

At around 12:00 p.m., the jury informed the court that it had reached a verdict. When counsel arrived at the courtroom for the verdict, defense counsel learned of the modified readback requests, told the court she was never informed of these modified requests, and objected that the court's procedure for providing that read back violated her client's statutory rights. She therefore requested a mistrial. The court stated that a motion for a new trial was more appropriate because the jury had already reached a verdict. The court denied the motion for a mistrial without prejudice. The jury found Eatmon guilty of all three counts.

Eatmon filed a motion for a new trial, arguing structural error due to the court's failure to inform counsel of the jury's read-back request as required by Penal Code

section 1138.[2] The trial court denied the motion for a new trial, making clear that it did not abdicate its authority and that it could find no prejudice as "there was not anything of substance [in Kevin's] testimony that could have moved [the court] to order additional read back."

2. Transcript of Read-Back

The testimony read to the jury began with Kevin testifying that he ran to Tiana and his "auntie" Maria right after the shooting, ran back to the car, then left the scene because he had a warrant and did not want to be there when police responded. He acknowledged that he only spoke to police after he was arrested. He also admitted that he lied when he testified about the murder in the May 2015 preliminary hearing. But Kevin claimed he was telling the truth at trial because he wanted to "keep it real." This portion of the transcript was just shy of five pages long.

The jury then asked for readback of Kevin's in-court identification of Eatmon, which the court reporter provided. In that testimony, Kevin stated that he knew Eatmon "through the streets" and identified him in the courtroom. This was only a half-page of testimony.

The jury also requested Kevin's identification of the shooter, so the court reporter produced a page-long excerpt of Kevin's testimony during which he said he saw the shooter in the driver's seat of the minivan and it was Eatmon. The court reporter also read a brief exchange between the court and Kevin during which Kevin testified that he knew the shooter was Eatmon when he looked up and saw Eatmon's face just before Eatmon started shooting.

3. Review

Penal Code section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given

[2] Unless otherwise stated, all statutory references are to the Penal Code.

in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." As section 1138's primary purpose is to provide the jury with the evidence it needs for its deliberations, a conviction will only be reversed for violating it if prejudice is shown. (*People v. Frye* (1998) 18 Cal.4th 894, 1007, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420-421.)

Generally, the trial court must allow the rereading of relevant testimony as requested by the jury. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 261, citing Pen. Code, § 1138.) However, the trial court does not err by asking the jury to decide whether it wants to refine its request if the requested testimony will take considerable time to prepare. (*People v. Anjell* (1979) 100 Cal.App.3d 189, 202-203, disapproved on another ground in *People v. Mason* (1991) 52 Cal.3d 909, 942-943.)

While counsel should be notified of jury requests for testimony to ensure that counsel has an opportunity to object to the course of action undertaken by the court or suggest an alternative (*People v. Wright* (1990) 52 Cal.3d 367, 402, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.), it is the jury—rather than the parties or their attorneys—that determines what testimony is read back. (*People v. Ayala* (2000) 23 Cal.4th 225, 289.) Counsel cannot compel the trial court to order the jury to listen to a reading of testimony that it does not want to hear. (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

In this case, the trial court complied with section 1138 when it informed the parties of the jury's request for Kevin's complete testimony but violated section 1138 when it failed to inform the parties of the jury's modified request.

The Supreme Court of the United States has never held that a jury request and readback of testimony is a critical stage of a trial that compels review for constitutional error (*People v. McCoy* (2005) 133 Cal.App.4th 974, 982), and our California Supreme Court has made clear that "the rereading of testimony is not a critical stage of the proceedings." (*People v. Cox* (2003) 30 Cal.4th 916, 963, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420-421; *accord People v. Horton* (1995) 11 Cal.4th 1068, 1121 ["[t]he reading back of testimony ordinarily is not an event that bears

a substantial relation to the defendant's opportunity to defend. . . ."].) Nevertheless, the standard reviewing courts apply to improper communication between the court and a deliberating jury remains unsettled. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1027-1028; *People v. Hawthorne* (1992) 4 Cal.4th 43, 68 fn. 14.) In the absence of specific direction, we will apply the standard of review for constitutional error that has been used by the courts in reported cases and consider whether the failure to apprise Eatmon and his counsel of the jury request for a read back of the Kevin's testimony was harmless beyond a reasonable doubt. (See e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 383-384.) Under this standard, we conclude Eatmon was not prejudiced by the court's error.

First of all, the jury requested to hear very specific portions of Kevin's testimony. The note requested a read back of "only DA question and answer" pertaining to Kevin's identification of Eatmon as the shooter to the victim's aunt and his statement that he never voluntarily spoke to the police. The other portions read to the jury upon its request to the court reporter were Kevin's two in-court identifications of Eatmon, and a portion when Kevin said he told his aunt that Eatmon was the shooter and he looked at Eatmon right before he started shooting.

Although Eatmon argues that he would have asked that other portions of the testimony be read to remind the jury of Kevin's dubious credibility, his credibility was vigorously attacked by defense counsel in closing argument. She argued Kevin had a motive to lie because he was facing criminal charges and was hoping for leniency and that Kevin should not be believed because he had given inconsistent statements to police about the crime. Both points were emphasized and extensively argued by the defense in closing. So, too, was the point that Kevin could not have been looking at the shooter.

The jury was also instructed on the factors that bear on the credibility or believability of witnesses with CALCRIM No. 226, and of the factors that bear upon the accuracy of eyewitness testimony provided in CALCRIM No. 315. Eatmon's counsel went through both instructions in closing argument and emphasized how they applied in this case.

Moreover, nothing in Kevin's testimony rebuts or calls in to question Tiana's identification of Eatmon as the shooter and driver of the van when she spoke to the police on the day of the murder and showed them a photo of Eatmon from Facebook. Eatmon's cell phone was located in the vicinity of the murder when it occurred, and a gold van with a black hood was seen in video footage from the area. Later, Eatmon's phone was near the Oakland Coliseum where his friend picked up the van. She explained that she received a call from Eatmon that day to see if she wanted to use it. In the conversation, Eatmon told her that when she was done with the van, she should drive it straight home.

In short, this record establishes beyond a reasonable doubt that the result would have been no different if additional portions of Kevin's testimony were offered to the jury or read back.

Eatmon argues that the error here is akin to the error in *People v. Dagnino* (1978) 80 Cal.App.3d 981 (*Dagnino*), where the trial court responded to the jury's inquiry by giving it supplemental substantive jury instructions without first consulting counsel. (*Id.* at pp. 984-985.) Because the error occurred during a critical stage of trial proceedings, the appellate court presumed prejudice and required the prosecution to show the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*Dagnino, supra,* at p. 989.) No matter. *Dagnino* does not compel a different result here. This case involves neither instruction of the jury without notice to counsel as in *Dagnino,* nor was there anything prejudicial or improper contained within the portion of Kevin's testimony that was read to the jury. (See *People v. Brew* (1984) 161 Cal.App.3d 1102.) The evidence of Eatmon's guilt was overwhelming. The error was harmless beyond a reasonable doubt.

Gang Expert Testimony

Eatmon contends the trial court should not have admitted expert testimony on gangs to prove motive because it was more prejudicial than probative. Eatmon further claims admission was inappropriate in the absence of a charged enhancement or special circumstance.

1. Record

Sergeant Frederick Shavies testified as an expert on East Oakland African-American gangs, particularly Eatmon's gang, the 76 Bandits, and the victim's gang, the Ney Team. Sergeant Shavies gained his expertise while investigating gang criminal activity as an Oakland Police Officer. In his experience, people join such gangs in East Oakland based on neighborhood alliance or family connections. To join, prospective members commit specific violent crimes. Gang members continue to commit crimes in broad daylight to show they will do anything necessary to "take out" rival gangs and to build fear and respect within their community. For example, gangs use drive-by shootings to attack rival gangs and escape quickly. Gangs then use social media to spread their reputation for violence among rival gangs and their community.

Sergeant Shavies testified that the 76 Bandits, or Bandits for short, were an East Oakland gang that sold narcotics and committed shootings and murders. To show membership, the Bandits wore Philadelphia 76ers and the Unocal 76 logos and made hand signs of sevens and sixes. The Bandits also used the phrase " 'all Bandits up' " to show allegiance to the gang. Sergeant Shavies opined that Eatmon was a Bandits gang member based on photographs of the Unocal 76 gas station logo posted to Eatmon's social media profiles, photographs of Eatmon making hand signs of a six and/or a seven, photographs of Eatmon's tattoos , photographs of Eatmon with other Bandits gang members, photographs of other Bandit gang members , and social media accounts with phrases like " 'All Bandits Up' " associated with Eatmon. He also relied on a November 4, 2016 letter Eatmon sent from jail to "Arco," another Bandits gang member whose given name is Jamarco Jackson. Eatmon signed the letter, "ABU Ken," which abbreviation stands for "All Bandits Up."

Sergeant Shavies testified that the Ney Team was another East Oakland African-American gang. The victim and Kevin were members of Ney Team based on photographs of them with other Ney Team gang members in which they also displayed certain hand signs.

Lastly, Sergeant Shavies explained that the Ney Team and Bandits became rivals in September 2011 because a member of the Bandits killed a member of the Ney Team. The Ney Team and Bandits were fighting in August 2013, when Eatmon killed the victim.

2. Review

Eatmon contends the court should have excluded Sergeant Shavies' testimony under Evidence Code section 352 because it was so prejudicial that "deprived [him] of his constitutional due process right to a fundamentally fair trial." Admission of evidence in violation of state law, including the Evidence Code, violates due process if it makes a trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Nevertheless, we generally review the decision to admit evidence for an abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 (*Albarran*).)

Under Evidence Code section 352, relevant evidence may be excluded if its probative value is outweighed by a substantial danger of undue prejudice, confusion of the issues, or of misleading the jury. "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Evidence of gang affiliation is relevant and admissible to show a motive was gang related when its probative value is not outweighed by its prejudicial effect. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) " ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." ' [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168, citing *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) However, given its highly inflammatory

nature, a trial court should carefully scrutinize gang-related evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Here, the trial court did not err. Eatmon and the victim were members of rival gangs that were fighting, and members had killed each other before the charged incident. This fighting began when a Bandits gang member killed a Ney Team gang member two years before the victim was murdered. Tiana and Kevin saw a Bandit gang member in Ney Team territory earlier that morning. The drive-by shooting was a common tactic that these gangs used to retaliate. "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—[could] help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Sergeant Shavies' expert testimony thus assisted the jury with understanding Eatmon's motive.

Nevertheless, Eatmon claims evidence of his gang affiliation is too tangential and therefore prejudicial because he did not explicitly claim the killing was gang related or brag about the killing as such. But direct evidence of motive is not necessary. Circumstantial evidence can suffice to prove motive and mental state. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1149 [" '[I]ntent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime.' "]; *People v. Mullen* (1953) 115 Cal.App.2d 340, 343 [circumstantial evidence can prove motive].)

Eatmon further asserts the gang evidence should have been excluded because no gang offense, enhancement, or special circumstance was charged. However, numerous cases have upheld the admission of gang evidence where gang allegations were not charged and where, as here, a defendant's conduct may be part of or directly related to the goals, purposes, and activities of a criminal organization. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 921-925 [upholding admission of gang evidence], overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 868.) Such

admission of gang evidence has been repeatedly upheld, irrespective of the charges, when it "is relevant on the issue of motive or the subject matter at trial." (*People v. Frausto* (1982) 135 Cal.App.3d 129, 140.)

Finally, Eatmon likens his case to *Albarran*, *supra*, 149 Cal.App.4th 214. In *Albarran*, the People argued Albarran had committed a shooting to benefit his gang because of the shooting's location, its timing during a party, and the participation of multiple shooters. (*Id.* at p. 221.) Although the trial court permitted the People to present evidence of Albarran's gang membership, the appellate court held the evidence was too tangential to be relevant. (*Id.* at pp. 227-228, 230-232) *Albarran* is inapposite. The prosecution in *Albarran* presented "no percipient witness or evidence to prove the crime was gang related or motivated" (*Id.* at p. 219), and instead relied exclusively on the testimony of a gang expert. (*Ibid.*) In contrast, here, Kevin testified that Eatmon and the victim were members of rival gangs. A Ney Team gang member had previously been killed by this rival gang, and Eatmon's gang was seen by Kevin and Tiana in the victim's gang's territory the morning of the shooting.

In short, gang expert testimony was not unduly prejudicial and was admissible to prove Eatmon's motive irrespective of whether any gang enhancement or allegation was filed.

B. Gang YouTube Video

Eatmon also asserts a video featuring Eatmon's gang should not have been admitted because it contained hearsay statements and was more prejudicial than probative.

1. Record

The trial court permitted the People to admit a video called "Popped in Oakland" (the video) featuring other Bandit gang members because Eatmon appeared briefly in the video. The video's main subject is a specific Bandit gang member, "Hennesy," who acts as its narrator. He begins the video talking about being shot twice and showing his scars. Hennessy explains that they live on 76th Avenue while showing a Bandit gang member wearing a jacket with a 76ers logo and explaining that they "represent it to the fullest."

Next, the video cuts to shots of the narrator hanging out with other young men showing off stacks of cash and modified cars, while he explains how he was shot building up this lifestyle and reflects, "everything that glitters ain't gold." Eatmon appears on screen for a couple seconds, blending in among other young men admiring the vehicles. The video highlights two other men: a young man who explains how his life was his twenty-first birthday present and a sixteen-year-old sitting in a wheelchair who explains how he was paralyzed by a bullet three years before. The video ends with another Bandit member explaining that the narrator died after being shot and a close-up of a makeshift memorial to him featuring a poster that reads "All Bandits Up."

The "Bandits" are only directly named in the video twice: once when the narrator explains, "it ain't easy being a Bandit," and once when he welcomes the audience to "Bandit-field California."

Eatmon objected to admission of the video, and the court considered the objection in a hearing outside the presence of the jury. The trial court explained in ruling on the objection that Eatmon appeared briefly in the video along with several other Bandits. The trial court agreed that the video "tend[ed] to show that the Bandits are predisposed to commit crimes," but believed that a possible limiting instruction would resolve any issue.

During the trial, the People introduced the video through gang expert Sergeant Shavies, who testified that it assisted him with his determination that the Bandits were a gang, and that he recognized several Bandit gang members in the video, including Eatmon. The video was admitted into evidence without further objection or request for a specific limiting instruction. The jury was generally instructed that certain evidence was admitted for a limited purpose, and they were to consider it for that purpose and no other.

2. Review

Eatmon contends that the video should have been excluded because it contained inadmissible hearsay. Eatmon further claims that admitting the video violated the Evidence Code and his constitutional rights to due process and a fair trial. (Evid. Code § 1200, subd. (b); U.S. Const., Amends. V and XIV; *Chambers v. Mississippi* (1973) 410

U.S. 284, 294.) We review its admission for abuse of discretion. (*People v. Brown*, *supra*, 31 Cal.4th at 547; *Albarran*, *supra*, 149 Cal.App.4th at 224-225.)

The Attorney General claims the video was admitted for the nonhearsay purpose under Evidence Code section 1101 to show Eatmon's motive and identity. For example, in *People v. McKinnon* (2011) 52 Cal.4th 610, the prosecution admitted evidence of rumors that McKinnon's victim had killed one of his fellow gang members to establish McKinnon's motive for murder. (*McKinnon*, *supra*, 52 Cal.4th 655-656.) The court explained that the evidence "was properly admissible for the relevant nonhearsay purpose of showing defendant had heard information about [the] murder and its gang implications 'on the street,' that defendant *believed* what he had heard, and that he thus had reason, in his own mind, to kill [his victim] 'for Scotty.' " (*Id.* at p. 656.) In sum, this evidence helped "prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

While not as compelling as in *McKinnon*, here the video was relevant to show Eatmon's status as a Bandit gang member and his motive for revenge on a rival gang. (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 737-738.) The video could have been edited to exclude certain extraneous and arguably prejudicial material, but its overall probative value outweighed any prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 194.) We therefore conclude its admission was not unduly prejudicial.

C. Cumulative Error

Eatmon contends that the cumulative effect of the purported errors undermined the trial's fundamental fairness and requires reversal. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we do not conclude the judgment was affected by the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

D. Sentencing

Eatmon requests that his case be remanded so the trial court can decide whether it should exercise its discretion to strike a previously mandatory sentencing enhancement. We agree.

1. Record

The court sentenced Eatmon to an indeterminate sentence of 25 years to life for first-degree murder and added an additional term of 25 years to life for discharging a firearm resulting in death under section 12022.53, subdivision (d). The total sentence for Eatmon's first-degree murder conviction was therefore an indeterminate sentence of 50 years to life.

Next, the court imposed a two-year midterm sentence for possession of a firearm by a convicted felon and ordered this sentence consecutive to the sentence for first-degree murder. Finally, the court imposed a midterm sentence of five years for shooting at an occupied vehicle and added a 25-year-to-life enhancement under section 12022.53, subdivision (d), for Eatmon's personal use of a firearm.

The court found that Eatmon's convictions for first-degree murder and shooting at an occupied vehicle were based on the same course of conduct and stayed the sentence for shooting at an occupied vehicle under section 654. Thus, the total prison term was an indeterminate term of 50 years to life plus a consecutive determinate sentence of two years.

2. Review

At the time of Eatmon's sentencing, imposition of the firearm use enhancement under section 12022.53 subdivision (d) was mandatory. However, Senate Bill 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018, ("Senate Bill 620")), which amended Penal Code section 12022.53, subdivision (h), became effective on January 1, 2018. Amended Penal Code section 12022.53, subdivision (h), provides trial courts discretion "in the interest of justice pursuant to Penal Code section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." Eatmon therefore requests that we remand his case for resentencing because amended Penal Code

section 12022.53, subdivision (h), is retroactive, and the court could have declined to impose the additional 25-year term. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091.)

The Attorney General agrees that amended Penal Code section 12022.53, subdivision (h), is retroactive. However, the Attorney General argues the trial court would have imposed the firearm enhancement even if it had discretion not to, because it struck four enhancements for prior prison terms. The Attorney General therefore seems to contend remand is unnecessary because the court would have imposed the enhancement even it had discretion to strike it. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

It is also possible to conclude the court would have declined to strike the 25-year enhancement under Penal Code section 12022.53, subdivision (g) because it imposed a two-year sentence consecutive to the indeterminate sentence of 50 years to life. Had the court determined that 50 years to life was adequate or excessive, it could have imposed the 2-year determinate sentence concurrent to the life term. Instead, it crafted a longer sentence.

But neither analysis carries the day because the court never addressed whether it would have exercised its discretion to impose a 25-year enhancement under Penal Code section 12022.53, subdivision (g) if it was not mandatory. We therefore conclude that remand is appropriate for the court to exercise its discretion.

III. Disposition

This case is remanded to the trial court to exercise its discretion under Penal Code sections 12022.53, subdivision (h) and 12022.5, subdivision (c), and, if appropriate, to resentence Eatmon. In all other respects, the judgment is affirmed.

_____
Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Petrou, J.